In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-67

DAVID C. NIBLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, contends that his failure to appear in court at the appointed time to represent his client at a pre-trial hearing was not punishable as summary criminal contempt under Rule 42(a), Fed. R. Crim. P.

Petitioner, a member of the District of Columbia bar, was appointed to represent a defendant in the United States District Court for the District of Columbia. On November 30, 1971, while petitioner was present before the district court during his client's arraignment, a suppression hearing was scheduled for 9:30 a.m. on December 15, 1971.

Though petitioner's client appeared at the appointed hour on December 15, petitioner himself did not arrive until 11:20 a.m. The following discussion then took place (Tr. 2):

THE COURT: Where have you been, Mr. Niblack?

MR. NIBLACK: I did not have this on my calendar. I was not notified. I am sorry. I was in the court house.

THE COURT: May I see the jacket?

It is now 11:20. We have been waiting for you since 9:30. The defendant was in court and the jacket shows that this was set for hearing on December 15 at 9:30.

MR. NIBLACK: I saw the jacket.

THE COURT: This has happened many times in the past. I warned you repeatedly and the Court has no alternative, in view of the situation here, but to adjudge you in contempt. You will be fined $50 or ten days.

Following a brief recess, petitioner again addressed the court (Tr. 2-3):

MR. NIBLACK: Your Honor, I think there was to be a date set for motions.

I am sorry. I wasn't prepared on the case. I—the thing completely slipped my mind. I was in here the day it was indicated, but I did not write it down in my book and I normally rely on written notice.

Generally all cases come from the Assignment Office. It did not come in this case.

I was in the court house this morning on an appearance before Judge Green.

I was in the library doing research.

The court set a new date for the suppression hearing, then responded to petitioner's explanation for his tardiness (Tr. 4-5):

THE COURT: Mr. Niblack, I have had prepared an order of adjudication of contempt. It will be filed with the Clerk. Here is a copy for you.

Let me say that in nearly 15 years on the bench, this is the first time that I have found it necessary to hold a lawyer in contempt.

I have warned you time and again about being on time for your commitments to this Court.

We have had to chase you down in other courts on occasion, but today, without any justification or excuse, you were more than an hour late.

Now, this is a light penalty. If there are any further violations, the penalty will be substantially increased.

When you are told to be in the courtroom at 9:30, you are to be here without any further notice or you are to notify my clerk or secretary as to where you are and why you are not in court.

How much time do you want to pay the fine?

MR. NIBLACK: Ten days, Your Honor. Five days.

THE COURT: I will give you five days. I hope this will teach you a lesson. I have given you every opportunity without success, but I will not put up with this in the future.

Later that day, the court issued an order of criminal contempt (Pet. App. B) finding petitioner guilty of "a breach of directions of the Court, that is, to be in Court at a given hour to proceed with the [suppression] hearing * * *." The order provided further that petitioner was to pay a fine of fifty dollars or serve ten days in jail. In entering the contempt adjudication, the court was

acting pursuant to Rule 42(a), Fed. R. Crim. P., which authorizes summary disposition of contempts committed "in the actual presence of the court."[1] The court of appeals affirmed, *per curiam*, holding that summary punishment was proper under the circumstances (Pet. App. A).

Petitioner contends that the district court had no authority to punish him summarily pursuant to Rule 42(a), since the conduct constituting the contempt did not occur "in the actual presence of the court." He argues that he was therefore entitled to disposition on notice and by way of hearing, as provided by Rule 42(b). The court of appeals, however, correctly determined that the trial court had the authority to punish petitioner summarily. The "actual presence" requirement of Rule 42(a) is in accord with prior law limiting the summary contempt power to cases of direct contempt committed "under the eye or within the view of the court." *In re Saven*, 131 U.S. 267, 277. Summary procedures are thus limited to situations in which the judge personally witnesses all relevant acts or omissions before punishing the contemnor. See *Ex Parte Terry*, 128 U.S. 289, 312-314; *Groppi* v. *Leslie*, 404 U.S. 496, 503-505. In the instant case, the trial judge personally observed all matters relevant to the determination of contempt—petitioner's failure to appear on time, his belated appearance, and his unacceptable explanation for tardiness. It was thus immaterial that petitioner was not present in the courtroom through-

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[1] Rule 42(a) provides:

> **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

out the entire period of the offense. *Lyons* v. *Superior Court of Los Angeles County*, 43 Cal. 2d 755, 278 P. 2d 681, certiorari denied, 350 U.S. 876; see *In re Oliver*, 333 U.S. 257, 275-276.[2]

As a practical matter, moreover, it is hard to imagine how petitioner could have benefited from a formal hearing. The district court here allowed him an opportunity to explain his tardiness, but no satisfactory explanation was given. Petitioner did not deny that he had been present in the courtroom when the date for the suppression hearing was set, but merely stated that "I normally rely on written notice" and "the thing completely slipped my mind" (Tr. 3). His failure to appear on time, particularly in view of similar violations in the past, provided an ample basis for the conclusion that his conduct disclosed a "reckless disregard for his professional duty." *Sykes* v. *United States*, 444 F. 2d 928, 930 (C.A. D.C.). Significantly, on the day of the contempt adjudication petitioner did not request a hearing on the matter and made no objection to the procedure followed by the court. Nor does petitioner now suggest that he could

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[2] The summary contempt power is also limited to situations where there is a "need for immediate penal vindication of the dignity of the court." *Cooke* v. *United States*, 267 U.S. 517, 536; see *Harris* v. *United States*, 382 U.S. 162, 165. A court must have the power to punish swiftly when necessary to "maintain its authority and continue with the proper dispatch of its business. *In re Oliver*, 333 U.S., at 274-275; *Ex parte Terry*, 128 U.S., at 308, 310; *Johnson* v. *Mississippi*, 403 U.S. 212, 214 (1971); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 463 (1971)." *Groppi* v. *Leslie*, *supra*, 404 U.S. at 503-504. Petitioner does not challenge the reasonableness of the district court's belief that immediate action was required. In any event, petitioner's repeated tardiness, despite warnings "time and again" (Tr. 4-5), was an affront to the dignity of the court that could be dealt with most effectively by immediate punishment, a remedy that would best assure the orderly flow of proceedings in petitioner's client's case.

produce any explanation for his tardiness other than that offered to the district court during informal discussion of the matter. Petitioner has thus suffered no disadvantage from the district court's use of the summary contempt procedure.

Petitioner correctly notes that the decision that his contempt justified the use of summary procedures is inconsistent with *United States* v. *Willett*, 432 F. 2d 202 (C.A. 4).[3] The court below distinguished its earlier decision in *Klein* v. *United States*, 151 F. 2d 286 (C.A. D.C.), upon which the *Willett* opinion relied, since in *Klein* there was no disobedience of a specific direction to appear in court on a specific date. Even assuming that *Willett* would nevertheless be followed in the Fourth Circuit today, we do not believe the issue arises frequently enough or is otherwise significant enough to merit review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[3] State court decisions are not consistent, but the weight of state authority seems to support the view that summary procedures are not proper in these circumstances. See Annotation, 97 A.L.R. 2d 431, 457.